POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

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PCB PENALTY POLICY

INTRODUCTION

Background

In 1980, the Environmental Protection Agency (EPA) issued interim guidance for the determination of penalties for violations of the Polychlorinated Biphenyls (PCB) rules. That interim policy was published in the Federal Register on September 10, 1980, with a statement that the Agency would review its experience with the policy before issuing a final penalty policy.

Since developing the 1980 interim guidance, numerous PCB regulations have been promulgated, including but not limited to regulations for use in closed and controlled waste manufacturing processes, various use authorizations, incidental generation, regulations to address fires involving PCB electrical equipment, and the notification and manifesting of PCB waste activities. Amendments, interpretations and revisions to the interim guidance have also been developed. This revised penalty policy is intended to incorporate the enforcement-related provisions of all PCB rules and policy revisions to date, including the Notification and Manifesting Rule, and all future applicable rules.

The purpose of this PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations. This policy is immediately applicable and will be used to calculate penalties in all administrative actions concerning PCBs issued after the date of this policy, regardless of the date of the violation.

This policy implements a system for determining penalties in administrative civil actions brought pursuant to Section 16 of the Toxic Substances Control Act (TSCA). Penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- the "nature" of the violation,
- the "extent" of potential or actual environmental harm from a given violation, and
- the "circumstances" of the violation.

These factors are incorporated in a matrix which allows determination of the appropriate proposed GBP.

Once the GBP has been determined, upward or downward adjustments to the proposed penalty amount may be made in consideration of these other factors, either before issuance of a civil administrative complaint, or during settlement negotiations:

- o culpability,
- o history of such violations,
- o ability to pay,
- o ability to continue in business, and
- o other matters as justice may require, such as environmentally beneficial expenditures.

TSCA is a strict liability statute, and there is no requirement that a violator's conduct be willful or knowing for it to be found in violation of TSCA or its implementing regulations. The existence of a violation is to be determined without consideration of the particular culpability of a violator; this factor is to be considered only as an adjustment to the GBP. The initial GBP may increase, decrease, or remain the same when considering the violator's culpability as an adjustment to the proposed penalty.

Penalties

The PCB regulations include a ban on the manufacture, processing, and distribution in commerce of PCBs, as well as requirements for proper use, storage, disposal, recordkeeping, and marking. EPA has several enforcement options available for dealing with PCB Rule violations. For minor violations, EPA's Regional offices will have the discretion to issue a Notice of Noncompliance. In many cases, EPA will issue civil administrative complaints, using this policy to calculate the appropriate civil penalty. In addition, Section 17 (a) of TSCA, 15 U.S.C. Sec. 2616(a), authorizes Federal district courts to issue injunctive relief to restrain violations of TSCA or the PCB rules. Finally, in some instances EPA may seek criminal sanctions, in accordance with Section 16(b) of TSCA, 15 U.S.C. Sec. 2615(b), for knowing or willful violations of TSCA or the PCB rules.

EXPLANATION OF THE POLICY

Chemical Control Nature of the Regulations

The PCB regulations reduce the chance that additional PCBs will enter the environment, and limit the harm to health and the environment when entry does occur. Therefore, these regulations are chemical control regulations, as defined by the TSCA Civil Penalty Policy. The definitions of the "extent" and "circumstances" categories below reflect the chemical control nature of these violations.

Extent

The greater the quantity of PCBs there is in a violation, the greater the degree and likelihood of harm from the conduct or activity violating the PCB rules. Therefore, the amount of PCB involved in a specific violation will determine whether the Major, Significant, or Minor extent category is used in assessing a penalty based on the GBP Matrix. Since the concentration of the PCBs involved in a violation will also affect the potential for harm, this factor must also be considered in determining which extent category is applicable.

1. Amount of Material Involved

For the purpose of this policy, violations of the PCB rules fall into two broad categories: non-disposal violations and disposal violations. Non-disposal violations include, but are not limited to, unauthorized use, failure to mark the access to PCB Transformers, failure to keep records, failure to provide adequate curbing at PCB storage areas, manufacturing PCBs without an exemption, and similar actions where the violator possesses PCBs that have not escaped into the environment. Disposal violations occur when PCBs are disposed of in a manner not permitted by the PCB regulations. Examples of such violations include, but are not limited to, the immediate release of PCBs from leaks or spills, or delayed release, such as when non-leaking PCB Equipment is improperly disposed of in a non-TSCA landfill. Because the degree of harm or potential harm is generally different for disposal and non-disposal violations, separate categories of extent are assigned, as described below.

a. Extent for Non-Disposal Violations

The regulations pertaining to non-disposal requirements such as use, storage, and manifesting of PCBs and PCB Items, reduce the potential for harm, help the Agency determine compliance, and track the movement of PCBs from use to disposal. For example, a major use of PCBs is in electrical transformers. The conditions for using transformers, such as inspection, keeping records of inspection, marking, and notification of fire response personnel and adjacent building owners, reduce the likelihood of improper disposal, minimize the potential harm from fires, and help the Agency determine a user's compliance. Similarly, the conditions for storing PCB liquids, PCB Articles such as transformers and capacitors, and PCB-contaminated soil, concrete, and debris help the Agency determine compliance and reduce the likelihood that PCB will escape into the environment. Compliance with the notification and manifesting requirements also serves these ends.

The only acceptable alternative to compliance with the non-disposal requirements of the PCB rules is lawful disposal. Accordingly, a fair penalty for violating the non-disposal requirements can be based on the cost of proper disposal of PCBs or PCB Items. This should provide adequate incentive to comply with the non-disposal requirements.

In cases involving non-disposal violations, the Agency will calculate the penalty using weight, or if unavailable, other units of measure that most closely fit the penalty scheme. For example, if PCB liquid is imported or manufactured, the penalty will be based on the weight of liquid. If PCBs unlawfully appear in a product, the penalty will be based on the weight of the

product, as adjusted for concentration. If weight is unavailable, other units may be used, such as the quantity of 55-gallon drums that the total production of the product would fill.

The following table identifies the quantities of PCBs that define the Minor, Significant, and Major extent categories. The Agency has set the upper limit of the Minor extent category at 1,200 kilograms (220 gallons) of PCB liquid, because it is approximately the amount contained in the average transformer. It should be noted that the primary unit of measure is weight, adjusted for concentration. Alternate measures include gallons for liquid, and 55-gallon drums for solids.

Minor Extent, Non-Disposal Violations

Unit	Amount Less Than
kilograms	1,200
gallons	220
Large Capacitors	50
55-gallon drums (solids)	15
Drained Transformers	5

Significant Extent, Non-Disposal Violations

Unit	Amount
kilograms	1,200 to 6,000
gallons	220 to 1,100
Large Capacitors	50 to 250
55-gallon drums (solids)	15 to 75
Drained Transformers	5 to 25

Major Extent, Non-Disposal Violations

Unit	Amount More Than
kilograms	6,000
gallons	1,100
Large Capacitors	250
55-gallon drums (solids)	75
Drained Transformers	25

b. Extent for Disposal Violations

Improper disposal of PCB generally presents a greater risk of harm to human health and the environment than non-disposal violations. Also, it is usually more expensive on a per-gallon basis to clean an area contaminated by PCB, and to dispose of the contaminated materials, than it is to incinerate the liquid alone. Penalties for such disposal violations are based on the approximate cost of cleanup and disposal of the materials contaminated by PCB.

For example, fresh spills onto non-porous surfaces such as metal or tile can often be decontaminated by rinsing and washing. The cost of such decontamination, including the need to take wipe samples for verification, is the basis of the Minor disposal category for non-porous surfaces. Spills onto porous surfaces, such as concrete, often result in contamination to some depth, depending on many factors such as porosity, the rate of spillage, and the type of PCB liquid. For the purpose of determining extent, the Agency arrived at a disposal cost estimate based on a nominal depth of contamination of one-eighth inch of concrete, concrete being the most common porous surface involved. The cost of removing the concrete, taking wipe samples for verification, disposing of the contaminated material, and encapsulating the area is the basis of the Minor extent category for porous surfaces.

For soil, the Agency bases its cost estimate on a spill onto relatively level ground with a nominal depth of removal of 10 inches to obtain sufficient decontamination. This should cover spills on a range of soils from clays to sands. The square footage assigned for spills onto soil reflects the approximate cost of removal and disposal.

Where the contamination is measured in cubic feet, the extent quantity is based on the cost of incinerating contaminated soil and concrete. The Agency has used available data and experience suggesting that a gallon of PCB liquid could contaminate about 2 drums of soil or concrete, which have a known average cost of disposal. While actual costs may in some cases be less, particularly if the material is less dense than soil or is suitable for landfilling, the costs assumed in this policy are generally applicable and should provide adequate incentive for compliance.

There are, of course, possible disposal violations that do not correlate exactly to the quantities listed below, such as landfilling or surface disposal of PCB Large Capacitors or PCB Transformers. In such cases, it is presumed that improper disposal will ultimately result in leakage and environmental contamination. In the event that equipment containing PCBs is improperly disposed, the violator should be penalized on the basis of the amount of PCB contained in the equipment, regardless of whether the PCB was leaking at the time of discovery. Penalties for improper disposal of drained PCB Transformers can be reasonably assessed using the approximate cubic footage of the transformer. Penalties for improper abandonment of PCB-contaminated pipeline could be assessed by calculating the square footage of the interior surface. This should provide adequate incentive to comply with the disposal requirements for PCB and PCB-containing equipment and materials.

It should be noted that when known, the source kilograms or gallons will be used to determine the extent for disposal violations. Square and cubic footage, which are based on gallons as described in the preceding paragraphs, are to be used when the kilograms or gallons are unknown.

Minor Extent, Disposal Violations

Unit	Amount Less Than
kilograms	25
gallons	5
sq. ft.	625 (non-porous surface) 60 (soil) 20 (porous surface)
cu. ft.	60 (all materials)

Significant Extent, Disposal Violations

Unit	Amount
kilograms	25 to 125
gallons	5 to 25
sq. ft.	625 to 3,125 (non-porous surface) 60 to 300 (soil) 20 to 100 (porous surface)
cu. ft.	60 to 300 (all materials)

Major Extent, Disposal Violations

Unit	Amount More Than
kilograms	125
gallons	25
sq. ft.	3,125 (non-porous surface) 300 (soil) 100 (porous surface)
cu. ft.	300 (all materials)

For both disposal and non-disposal violations, the Agency has structured the extent portion of the penalty policy to approximate the costs of disposal and cleanup and to remove any economic incentives to violate the rules. The violator will not only pay a penalty for violations, the violator will also pay any additional costs necessary to come into compliance.

The Agency notes that the cost-based extent figures for disposal and non-disposal violations exclude some costs such as transporting response personnel and contaminated materials, and do not account for potential variations in spill scenarios that cause greater or lesser actual costs of cleanup. Also, actual costs may increase or decrease during the time this policy is in effect. However, the objective of the policy is not to estimate actual costs for a specific case, but to provide a sufficient and reasonable basis for calculating penalties that will encourage compliance with the PCB rules. The Agency believes that the quantities selected for each extent category accomplish this objective.

2. Converting Volume to Weight

For converting volume to weight, the Agency assumes the average density of PCB liquid to be approximately 12 lbs. per gallon. If the actual density of the fluid involved in a violation is known, then the actual density should be used.

3. Exceptions to Extent Category

Spills into Water. Spills into water create a substantial risk of human exposure, either directly from the water, or through the food chain. Also, since it is virtually impossible to remove all PCBs from surface or ground water once a spill occurs, environmental harm is assured. Therefore, where any improper disposal results in the contamination of surface or ground water, or any conduits leading to same, such as drains, ditches, and wells, the extent will always be considered Major, regardless of the amount and concentration.

Spills into Food and Feed. Spills into food and feed, if not quickly detected, will result in human exposure. Even if the problem is detected before humans (or animals) eat the contaminated food, it is likely that the cost of finding and destroying the contaminated products will be high. Where any improper disposal results in the contamination of food or feed, such as spills onto vegetable gardens, pastures, or food storage areas, the extent is always Major.

4. Concentration Adjustments

The Agency recognizes that the concentration of PCBs is relevant to the potential or actual harm from violating the PCB regulations. Obviously, a spill of high concentration PCBs puts more contaminants into the environment than a spill of low concentration PCBs. Nonetheless, because PCBs can be toxic at very low concentrations, a spill of a large amount of low concentration PCB material could cause widespread harm. Thus, a system that would reduce the total weight of PCB material involved in a spill in direct proportion to the concentration of that material would severely undermine the regulatory scheme, and result in penalties that may not reflect the harm or deter improper disposal.

To determine the extent of probable damage for a particular violation, the total amount of PCB material involved in an incident should be reduced by the following percentages.

Concentration (ppm)	Reduction of Amount (%)
1) 0 - 49	50
2) 50 - 499	30
3) 500 or above	None

5. Exceptions to Concentration Adjustment Calculation

The concentration adjustment factors are not used in the following circumstances:

Dispersed Use. The use of waste oil that contains detectable concentrations of PCBs for heat recovery in non-conforming boilers, or as a sealant, coating, or dust control agent, which is prohibited by 40 C.F.R. Section 761.20(d), is one situation where the concentration reduction would not apply. The Agency chose to prohibit these uses whenever any detectable level of PCBs are present because any such use of PCBs is likely to result in widespread environmental and health damage. Thus, allowing any reduction of the amount of PCBs used by virtue of low concentration would be contrary to the regulatory scheme.

Failure to Test. The concentration reduction does not apply where the violation is the failure to test liquid when required, such as the contents of a heat transfer system that has contained PCBs (40 C.F.R. Section 761.30(d)(1)). In such cases, the risk is that the fluid may contain a high concentration of PCB, and that this material will continue to be used. These persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration.

Alternative Measure for Solids. The concentration adjustment shall not be used when the PCB material is measured by a measure for solids other than weight. These alternative measures, which include square footage, cubic footage, capacitors, drums, or drained transformers, were chosen to establish economic incentives for proper disposal. The cost of disposal of such materials is not dependent on their concentration of PCBs. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly.

Dilution. The concentration adjustment does not apply where the PCBs have been diluted in violation of the PCB rules.

Circumstances

The other variable for determining a penalty from the GBP Matrix is the circumstance of the violation, which reflects its probability of causing harm to human health or the environment. The circumstances are ranked high, medium, and low. Each of these ranges in turn has two different levels, for a total of six levels of circumstance, as shown on the GBP Matrix below. All violations of the PCB regulations fall into one of the circumstance categories identified in this policy.

GRAVITY BASED PENALTY MATRIX

Circumstances (probability of damages)	Extent of Potential Damage		
	A - Major	B-Significant	C - Minor
High Range			
Level 1	$25,000	$17,000	$ 5,000
Level 2	20,000	13,000	3,000
Medium Range			
Level 3	15,000	10,000	1,500
Level 4	10,000	6,000	1,000
Low Range			
Level 5	5,000	3,000	500
Level 6	2,000	1,300	200

The different types of PCB violations within each of the circumstances (or degree of probability of damages) on the GBP Matrix are discussed below. Note that the adjectives "major, significant, and minor" as used in the circumstance levels are not related to those terms in the GBP Matrix.

High Range

Level one:

1) Major disposal. This includes any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations, including unauthorized export. Failure to comply with the conditions of a TSCA approval for PCB disposal or alternative treatment, other than recordkeeping, also constitutes a level 1 violation.

2) Manufacturing PCBs without an exemption or in violation of any condition of an exemption, including unauthorized import.

3) Unauthorized incidental generation of PCBs.

4) Major manifesting. Failure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors.

5) Refusal to permit entry of an EPA inspector, in violation of TSCA Section 15. The proposed penalty will be Major, level 1 when the Agency has reason to believe that PCBs existed at the time of refusal and that PCB violations could have disappeared between the time of refusal and inspection. A level 1, Significant or Minor extent may be appropriate if mitigating information is subsequently provided showing that the amount of PCBs present at the time of refusal warrants the reduction of extent. The penalty for refusal will only be applied when the statutory requirements of Section 11 of TSCA, 15 U.S.C. Section 2610 have been met, which are:

   a) presentation of proper credentials;
   b) written notice to owner, operator, or agent in charge showing scope of inspection;
   c) inspection attempted to be commenced and completed with reasonable promptness;
   d) inspection attempted to be conducted at reasonable times (daylight business hours), with reasonable limits, and in a reasonable manner.

Level two:

1) Processing PCBs without an exemption or in violation of any condition of an exemption.

2) Distribution in commerce of PCBs without an exemption or in violation of any condition of an exemption.

3) Major use. Unauthorized use of PCBs or using PCBs in violation of any condition of authorization. Examples of such violations include, but are not limited to:

   a. Failure to register PCB Transformers with the local fire jurisdiction or the building

owners within the required time.

b. Storage of combustible organic solvents or other combustible liquids in or near the transformer area.

c. Failure to report a fire-related incident.

d. Failure to inspect PCB Transformers or to keep records of such inspections.

4) Major marking. A major marking violation is a situation where there is no indication to someone unfamiliar with PCBs that PCBs are present, such as failure to label the access to a PCB Transformer or failure to label the transformer.

5) Major storage. A major storage violation means a situation where a significant portion of spilled material would not be contained in the event of an accident, or where PCBs could be exposed to precipitation or overland flow of water. Examples of such situations are storage in areas with: no roof; no curbing, curbing that is pervious to PCBs, or curbing that does not meet the volume or height requirements; non-continuous or no flooring, unsealed floor drains, or flooring that is pervious to PCBs.

Medium Range

Level three:

1) Major recordkeeping. No records, or major recordkeeping violations, at disposal facilities, including incinerators, high efficiency or industrial boilers, landfills and other approved alternate disposal facilities. No records, or major recordkeeping violations, by transporters or commercial storers. Major recordkeeping violations would include failure to keep records or substantial discrepancies in records on disposal process operating parameters, landfill disposal locations, or disposal quantities or dates, or incomplete records on the receipt, inventory, or disposition of waste by commercial storers.

2) Minor disposal. An example of a minor disposal violation is a leak in which a PCB Article has PCBs on any portion of its external surface, but the PCBs did not run off the surface.

3) Significant manifesting. This includes failure to prepare or submit an annual report or an exception report.

Level four:

1) Minor use violations. These include the following:

a. Failure to provide complete transformer registration, but the fire department or adjacent building owners are aware of the transformer locations.

b. Failure to remove combustible materials other than organic solvents or other combustible liquids.

c. Failure to conduct all required visual inspections, but where a significant percentage was conducted.

d. Incomplete records of PCB Transformer inspections such as omitting the inspector's name, or omitting the specific location of the leak on the transformer.

2) Minor storage. Examples of these violations are small cracks in an otherwise impervious floor or curbing, and failure to conduct all required visual inspections, but where a significant percentage was conducted. Storage of PCBs in excess of 1 year, including failure to date PCB Items placed in storage.

3) Significant recordkeeping. No records, or major recordkeeping violations, by persons who manufacture, process, or use PCBs, except commercial storers, transporters, and disposers. Major recordkeeping violations would include the absence of data on PCB Transformers, or the absence of records on any transfer of PCBs from the site.

Low Range

Level five:

1) Minor marking violations. These are situations in which some requirements of the rule have not been followed, but there is sufficient indication that PCBs are present and the PCB Items can be identified.

Level six:

1) Minor recordkeeping and manifesting. Examples of such violations are the occasional omission of minor data due to clerical error, or partially missing records where the person responsible can substantiate the correct records upon request.

2) Failure to label small capacitors, fluorescent light ballasts, or large low voltage capacitors with a "no PCBs" label as required by 40 C.F.R. Section 761.40(g).

PENALTY ASSESSMENT FOR MULTIPLE VIOLATIONS

When to Assess Multiple Violations

A penalty shall be assessed for each violation of the regulations, and for each separate location where violations occur. A violation of the regulations is defined as non-compliance with any requirement of 40 C.F.R. Part 761, regardless of category or subpart. A separate location is any area where the violation presents a distinct risk to human health and the environment.

In short, penalties will be assessed as follows:

- One count for each violation of the regulations, regardless of categories. For example, if a PCB Transformer is not marked, and the means of access is not marked, then there are two violations and two counts.

- One count for each location that presents a separate and distinct risk. PCBs are in separate locations when they are in separate buildings or separate rooms. In large rooms, or outside, they are separate when they are at least 100 feet from any other PCBs. The EPA inspector shall determine whether a particular location is separate based on the above, and may consider other factors relevant to the risk associated with the violation and location.

Limits on Multiple Violations

Some acts of compliance are completely dependent on other acts, such as keeping records of transformer inspections. Thus, the lack of inspections will normally result in the lack of records of inspection. In such cases, only one violation should be charged, namely, failure to inspect.

Other acts of compliance affect a number of separate locations within a facility. For example, it takes a single act of compliance to register PCB Transformers with the fire department or adjacent building owners, regardless of the number of transformer locations. Thus, failure to register with the fire department is a single violative act per facility, as is the failure to register with an adjacent building owner.

Further, the Agency has determined that limits are appropriate for assessing penalties for violations of some periodic requirements, as follows:

- A separate count shall be charged for each quarterly inspection or record of inspection missed, with the limitation of assessing up to 4 missed inspections or $250,000, whichever is less.

- A separate count shall be charged for each annual document or annual inspection missed during the prior 3 years, and one count for all documents or inspections missed from years 4 and beyond.

ASSESSING PENALTIES FOR CONTINUING OR REPEAT VIOLATIONS

Under Section 16 of TSCA, the Agency has the discretion to assess civil penalties up to $25,000 per violation, with each day that a violation continues constituting a separate violation. Assessment of such per-day penalties is reserved for repeated acts, or acts that present considerable risk or harm, such as where someone improperly disposes of PCBs on more than one occasion, or when someone illegally imports PCBs on separate occasions. Each day of such violations is significant and warrants a separate penalty.

On the other hand, under the per-day principle, someone who stores an intact, 240-gallon PCB Transformer improperly for 30 days could be liable for $390,000, an excessive penalty in the absence of aggravating factors such as a history of violations or a risky storage environment. In such a case, the Agency would usually not assess penalties for each day of violation.

The Agency calculates penalties for continuing and repeat violations two different ways, either by combining the total quantity of PCBs involved during the period of the violation, or by multiplying the GBP by the number of days the violation occurred. To calculate the penalty using the former method, the Agency has developed the "proportional penalty calculation," whereby the penalty is proportional to the amount of material involved multiplied by the duration of the violation, subject to the limitation of $25,000 per day per violation. This method is usually reserved for continuing violations, and is explained in detail in appendix B. Using the latter method, the penalties are often larger than when proportional penalties are used. The Agency reserves the discretion to assess penalties using the latter method for repeated acts of violation, or when the circumstances, taking into consideration the seriousness of the violation or the severity of potential or actual environmental harm, warrant such penalties.

When the proportional penalty calculation yields more than $25,000 per day for any one violation, the penalty should be $25,000 per day for that violation, the maximum allowed by statute. The proportional penalty should be used in the same way as any other penalty derived from the GBP Matrix, i.e., the per-day penalty should be entered on line 1 of the TSCA Civil Penalty Assessment Worksheet (see appendix C). Regions should use the proportional penalty calculation as opposed to one day assessments for those violations where it can be documented that violations are continuing, such as failure to clean up after improper disposal of PCB. For violations that have not been corrected by the time of reinspection, EPA may either use the proportional penalty calculation or assess penalties on a per-day basis. Note that the proportional penalty method does not always result in smaller penalties than the per-day method. For large amounts of PCBs, it may be higher than a straight per-day multiplication of the GBP.

ADJUSTING THE GRAVITY BASED PENALTY

The GBP reflects the seriousness of the violation's threat to health and the environment. TSCA also requires the Agency to consider certain other factors in assessing the violator's conduct. These are culpability, history of similar violations, and ability to pay and to continue in business. In addition, the Act authorizes the Agency to use discretion in considering "other factors as justice may require." Under this last authorization, additional factors are considered and balanced: attitude; voluntary disclosure; the cost of the violation to the government; the economic benefits received by the violator due to his non-compliance; and the environmentally beneficial measures that a violator may perform in exchange for a reduction in penalty (see Settlement with Conditions). These factors are considered as follows.

Culpability

The two principal criteria for assessing culpability are (a) the violator's knowledge of the particular requirement and (b) the degree of the violator's control over the violative condition.

(a) The violator's knowledge. The lack of knowledge of a particular requirement does not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of the PCB rules. The test will be whether the violator knew or should have known of the relevant requirement or the possible dangers of his actions. As a general matter, any electric utility, and any company with PCBs, is deemed to have knowledge of all aspects of TSCA and the PCB regulations. Furthermore, a reduction in the penalty based on lack of knowledge can only occur when a reasonably prudent and responsible person would not have known that the conduct was dangerous or in violation of TSCA or the PCB regulations.

(b) Degree of control over the violation. The Agency expects PCBs to be handled prudently and that all reasonable measures will be taken to ensure compliance with the regulations. The Agency also expects that, when violations are discovered, the persons responsible for the facility or location will immediately take all necessary steps to come into compliance. Nevertheless, there may be situations where the violator is less than fully responsible for the violation's occurrence. For example, another person or company may have had some role in creating the violative condition and must therefore share the responsibility. Similarly, a discharge of PCBs into the environment can occur accidentally, even though the violator took prudent measures to avoid it. Such situations might warrant a reduction of penalties.

Three levels of culpability have been assigned for calculating penalties, as follows:

Level I:	The violation was willful. Adjust the GBP upward by 25 percent.
Level II:	The violator had (or should have had) knowledge or control. No adjustment to GBP.
Level III:	The violator lacked sufficient knowledge of the potential hazard created by his or another's conduct, and also lacked control over the situation to prevent occurrence of the violation. The violator's conduct was reasonably prudent and responsible. Adjust the GBP downward by 25 percent.

History of Prior Violations

The GBP Matrix is designed to apply to first offenders. Where a violator has demonstrated a history of "prior such" violations as stated in TSCA, the penalty will be adjusted upward to increase his motivation to comply. Also, repeat violators are penalized more severely because additional enforcement resources are spent on the same violator.

The Agency's policy is to consider only prior violations of TSCA or its rules, even though a violator could have a history of violations of other EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). Congress did not expressly state that it wanted the Agency to go beyond TSCA Section 15 prohibited acts in determining violation history.

The following considerations apply when evaluating a history of "prior such" violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in: a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; or the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint.

Violations litigated in the Federal courts, under the Act's imminent hazard (Section 7), specific enforcement and seizure (Section 17), and criminal (Section 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of noncompliance does not constitute a prior violation for the purposes of penalty assessment, since no opportunity has been given to contest the notice.

(b) To be considered a "prior such" violation, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining history. If one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation. In most cases of violations by wholly- or partly-owned subsidiaries, the history of the parent corporation shall apply to its subsidiaries, and the subsidiaries to the parent, particularly when the parent has a majority share of ownership. The exception would be where two companies are held by the same parent corporation. The companies may not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors.

(d) If the "prior such" violation is of a non-PCB-related TSCA provision or regulation, then the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the "prior such" violation is of any PCB-related TSCA provision or regulation, the penalty should be upwardly adjusted by 50 percent for the first repetition and 100 percent for the second repetition.

Ability to Continue in Business

Normally, EPA will not seek a civil penalty that exceeds the violator's ability to pay and, therefore, to continue in business. The agency will assume that the respondent has the ability

to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. The respondent will be notified in the civil complaint of its right under the statute to a consideration of its ability to continue in business. Any alleged violator can raise the issue of its ability to pay and to continue in business in its answer to the civil complaint, or during the course of settlement negotiations.

If an alleged violator raises the inability to pay as a defense in its answer, or in the course of settlement negotiations, it shall present sufficient documentation to permit the Agency to establish such inability. Appropriate documents will include the following, as the Agency may request, and will be presented in the form used by the respondent in its ordinary course of business.

1. Tax returns;
2. Balance sheets;
3. Income statements;
4. Statements of changes in financial position;
5. Statements of operations;
6. Retained earnings statements;
7. Loan applications, financing agreements, security agreements;
8. Annual and quarterly reports to shareholders and the SEC, including 10 K reports;
9. Business services reports, such as Compusat, Dun and Bradstreet, or Value Line.

Such records are to be provided to the Agency at the respondent's expense and must conform to generally recognized accounting procedures. The Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay.

OTHER FACTORS AS JUSTICE MAY REQUIRE

Attitude

In assessing the violator's attitude, the Agency will look at the following factors: whether the violator is making good faith efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any actions taken to minimize harm to the environment caused by the violation.

This adjustment applies equally to companies that voluntarily disclose violations and to those that do not. A company would generally qualify for a downward adjustment of a maximum of 15% if it immediately halts the violative activity and takes steps to rectify the situation. An upward adjustment of a maximum of 15% may be justified where company officials continue the violative activity after being notified to stop, do not act in good faith, hinder EPA's progress, cause increased government expenditures, or are otherwise uncooperative.

Voluntary Disclosure

The Agency encourages voluntary disclosure of PCB violations. To be eligible for a penalty reduction for voluntary disclosure, a firm must make the disclosure prior to being notified of a pending inspection. The disclosure cannot be one that is required by the PCB regulations or that is made after EPA has received information relating to the alleged violation.

Penalty amounts for violations of PCB regulations will be reduced when the violations are voluntarily disclosed by the company. This penalty reduction is separate from and in addition to the penalty reduction for culpability and attitude. For PCB violations, the penalty reductions for voluntary disclosure are as follows:

Voluntary disclosure:	25%
Immediate disclosure within 30 days of discovery AND takes all required steps:	15%
Total	40%

The penalty reduction of 15 percent may be given to a company which reports the potential violation to EPA within 30 days of having reason to believe that they may be in violation, and if the company takes all steps reasonably expected or requested by EPA to mitigate the violation. This includes timely submission of information necessary for EPA to assess the violation. Timely submission means within 30 days or a time period agreed upon by EPA and the company. This reduction can be in addition to penalty reductions for environmental expenditures above and beyond that required by the law. This reduction is only applicable to companies which have voluntarily disclosed the violation and may be taken in addition to other adjustments.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the civil complaint. The civil complaint should state the original penalty and the reduced penalty and the reason for the reduction.

Cost of the Violation to the Government

There may be occasions where it is necessary for the Agency to mitigate the effects of a violation, such as the cleanup of a dangerous spill where the violator will not take timely action or the violator is unknown at the time. An adjustment factor not specified in the statute, but which the Agency feels justice requires, is reimbursement to the government for funds expended to investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. Where the government deems it

necessary to undertake clean-up, the government could recover funds which it expended in an administrative proceeding under Section 16 of TSCA.

Economic Benefit of Noncompliance

The GBP is designed for deterrence and is effective where there is no overriding financial incentive to violate the rules. In some cases, the GBP may not be sufficient to deter in the face of strong economic incentives to violate. Where a violation involves significant economic benefit, the Agency will assess penalties that remove any benefit, subject to the statutory limitation of $25,000 per day. This will be in addition to the GBP and any relevant adjustment factors.

Economic benefits can be gained by avoiding an expenditure. Economic benefits can also be gained by delaying an expenditure, whereby the violator gains an economic benefit because the firm, or nonprofit entity, earns a return on the money that should have been used for compliance. An example of an avoided cost is a spill into water, which may be impossible to clean up. Delayed expenditures that could result in significant gains may include, but are not limited to: failure to replace PCB Transformers or to install enhanced electrical protection; leaving PCBs in storage for disposal longer than 1 year; failure to provide adequate facilities for storage; failure to make necessary improvements to disposal facilities; failure to decontaminate an area after a spill; and failure to decontaminate or replace PCB-contaminated equipment in unauthorized use.

In applying the economic benefit component, the Agency will use the most likely presumptions and the best information available to the case development team. For example, in a case where a firm has PCB-contaminated equipment that is not authorized for use, the Agency need not estimate the cost of decontaminating the equipment or the economic value of the equipment to the firm. Instead, the Agency may simply determine the cost of replacing the subject equipment by contacting the equipment manufacturer, and calculate the benefit of the delayed replacement cost.

Settlement With Conditions

The Agency may choose to adjust a civil penalty assessed for a violation of the PCB regulations in exchange for specific environmentally beneficial actions performed by the respondent. The settlement of a case under terms which commit the respondent to perform specified acts in exchange for reducing a portion of the penalty is a "Settlement with Conditions."

Appendix A Using the GBP Matrix to Find a PCB Penalty

In order to determine a penalty for a specific PCB violation, the following steps should be followed:

1) Determine the violation. If more than one violation is involved, repeat the calculation in steps 2 through 8 for each violation.

2) Find which level the violation fits on the circumstance axis of the GBP Matrix.

3) Calculate the total amount of PCBs involved in the violation. If there are several materials involved which fall into different concentration ranges, do a separate calculation for each concentration.

4) Apply the concentration adjustment. Note the exceptions to use of the concentration adjustment.

5) If different concentration ranges are present, add up the figures from step 4.

6) Determine which extent category (Major, Significant, or Minor) is applicable to the amount from step 5.

7) Use the level from step 2 and the extent from step 6 to locate the penalty on the GBP Matrix (e.g., Level 3, Significant is $10,000).

8) Enter the amount from step 7 on line 1 of the Civil Penalty Assessment worksheet attached to the TSCA Civil Penalty Policy. Use that worksheet to complete the calculation of the penalty accounting for factors such as culpability, history of violations, economic benefit of noncompliance, etc.

Example: An inspection of Company X reveals that the following items are all stored for disposal in a room with discontinuous curbing:

Two transformers
Three capacitors
One 800-gallon tank of PCB liquid

All three capacitors are PCB Large Capacitors with a volume of 5 gallons each. One transformer contains 300 gallons, and is tested at 700 ppm. The second transformer contains 500 gallons, and is an askarel unit and therefore contains over 500 ppm PCBs. It is leaking, and 70 square feet of concrete is contaminated. The 800-gallon tank is not leaking and the liquid is tested at 200 ppm. The density of the fluid in the 300-gallon transformer and the 800-gallon tank is found to be 8.5 pounds per gallon, and the density of the 500-gallon askarel unit is 12 pounds per gallon.

1) Determine the violations; these are disposal and storage. Because there are two violations, a calculation is needed for each.

Calculation for Disposal Violation

2) Find the "circumstances" level. This is level 1, for disposal.

3) Find the total amount involved. Since the leakage contaminated 70 square feet of concrete, no calculation is required to find the extent. (Note: where the quantity of PCB is known, the extent will always be based on weight in kilograms.)

4) Make concentration adjustment. No adjustment for alternative measure for solids.

5) Not applicable because spill was from a single source.

6) Determine extent category; 70 square feet of concrete (porous surface) is Significant.

7) Find penalty from matrix; Level 1, Significant = $17,000

8) Enter $17,000 on line 1 of the worksheet.

Calculation for Non-Disposal (Storage) Violation

2) Find "circumstances" level. Major storage (discontinuous curbing) is level 2.

3) Find total amount involved;

(a) Over 500 ppm:

(i) At 12 lbs/gal: One 500-gallon transformer
3 capacitors x 5 gal. ea. = 15 gallons
500 + 15 = 515 gal.
515 gal. x 12 lbs./gal. = 6,180 lbs.

(ii) At 8.5 lbs/gal: One 300-gallon transformer
300 gal. x 8.5 lbs./gal. = 2,550 lbs.

Subtotal: 6,180 lbs. + 2,555 lbs. = 8,730 lbs.
8,730 lbs. x .45 lbs./kg = 3,929 kg

(b) Under 500 ppm (8.5 lbs./gal. only): One 800-gallon tank

Subtotal: 800 gal. x 8.5 lbs./gal. = 6,800 lbs.
6,800 lbs. x .45 lbs./kg = 3,060 kg

4) Make concentration adjustment.

   (a) The transformers were both over 500 ppm, therefore there is no adjustment. Total remains at 3,929 kg.

   (b) The tankage was 200 ppm, which is under 500 ppm, but more than 49. Therefore, the quantity is reduced 30% as follows:
   3,060 kg x (1.0 - .30) = 2,142 kg

5) Add figures from step 4.

   3,929 kg + 2,142 kg = 6,071 kg

6) Determine extent category; 6,071 kg = Major (non-disposal)

7) Find the penalty from the matrix; Level 2, Significant = $20,000

8) Add $20,000 to line 1 of the worksheet.

   $17,000 (disposal) + $20,000 (storage) = $37,000.

Appendix B Calculating Proportional Penalties

The proportional penalty is used for continuing violations. It is calculated by multiplying the quantity of PCBs involved by the number of days of the violation. The sum of the PCBs times the duration is the basis for calculating the GBP. The proportional penalty is calculated in the following manner:

1) Multiply the amount of PCBs involved in the violation (reduced by the concentration adjustment) by the number of days the violation continued.

2) If the amount from step 1 is less than or equal to two times the Major extent category, use this amount to determine the extent category and obtain a penalty from the GBP Matrix. If the amount from step 1 is greater than two times the Major extent category, proceed to step 3.

3) Divide the total amount from step 1 by the Major extent category limit. Multiply the result by the dollar amount in the Major category. This yields the proportional penalty.

4) Divide the total penalty by the number of days involved. Enter this amount on line 1 of the TSCA Civil Penalty Assessment Worksheet.

Examples

(a) 5 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

1) 5 kg of askarel, no concentration adjustment.
5 kg x 30 days = 150 kg

2) 150 kg is less than two times Major extent (Major = 125 kg). Therefore, penalty is for 150 kg (Major, level 1) = $25,000.

3) Not applicable.

4) $25,000 divided by 30 days = $833.33 per day.

(b) 20 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

1) 20 kg of askarel, no concentration adjustment.
20 kg x 30 days = 600 kg

2) 600 kg is more than two times Major extent (125 kg). Therefore, go to step 3.

3) 600 kg divided by 125 kg = 4.8
4.8 x $25,000 (Major, level 1) = $120,000

4) $120,000 divided by 30 days = $4,000 per day.

Appendix C

Civil Penalty Assessment Worksheet

Name of Respondent: _____
Address of Respondent: _____
_____
_____

(1) Complaint I.D. Number: _____
(2) Date Complaint Issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1.	Gravity Based Penalty (GBP) from matrix:	$____
2.	Percent increase or decrease for culpability:	_____%
3.	Percent increase for violation history:	_____%
4.	Add lines 2 and 3:	_____%
5.	Multiply GBP by percentage total on line 4:	$____
6.	Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage):	$____
7.	Enter line 6 amount or $25,000, whichever is <u>less</u>:	$____
8.	Multiply line 7 by the number of days or violations:	$____
9.	Government clean-up costs, if any:	$____
10.	Economic gains from non-compliance, if appropriate:	$____
11.	Add lines 8 through 10:	$____
12.	Total of other adjustments as justice may require:	$____
13.	Add (or subtract) line 12 to (from) line 11:	$____

Note: Line 13 should be the proposed penalty for a given violation. The procedure is repeated for each violation.